proposition. The courts always decline to recognize an agreement to refer all disputes to arbitration as compelling them to stay an action, and do so because such an agreement would oust the jurisdiction of the King's courts. I prefer the language of Lord Sumner, concurred in by Lords Buckmaster and Atkinson, to the effect that as long as a clause does not exclude the claimant from such recourse to the courts as is always open by virtue of the provisions of the Arbitration Act, 1889, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. I think that Lord Sumner would have regarded a clause depriving the claimant of the protection of the Arbitration Act as an ousting of the jurisdiction and unenforceable. And I can conceive some conditions precedent to enforcing a claim which English courts would decline to enforce."

There are provisions in the rules of powerful organisations such as trade unions and political organisations forbidding their members, as far as they can lawfully do, from submitting their disputes to the decision of the courts unless and until certain conditions precedent are observed, for example until certain matters have been resolved by their domestic forums, upon which they themselves agree. The present case is a case in point. There have been others before the courts. What reason can there be for saying that there is anything contrary to public policy in allowing members to enter into such contracts? It seems to us that it would be a most inexpedient encroachment upon the liberty of the subject if he were not to be allowed to enter into such contracts. Is there anything contrary to public policy in saying that such organisations shall not be harrassed by court actions, the costs of which might be ruinous, and in which the delay in coming to a final decision disastrous? Does it not make for speedy and economical determination to refer such disputes to a domestic forum? We can see not the slightest inconvenience or denial of justice that can flow from such agreements. On the other hand, we see great advantages that may arise from them. So long as the courts retain sufficient hold over them to prevent and redress any injustice on the part of such organisations, and to secure that their decisions are in substance made in accordance with the requirements of natural justice and not with some home-made and arbitrary rules of the organisations the courts will not interfere with their decisions. By allowing the disputes to be first decided according to the rules of the organisations courts do not release real and effective control over them or allow them to be a law unto themselves or to give them a free hand to decide disputes according to their whims and fancies. No association is outside or above the law. But so long as at the appropriate moment recourse to the courts is available to the members, the courts can and will safely allow the members to organise their own affairs according to the terms and tenor of their agreements, but that appropriate moment will not have arrived until and unless the members have fully utilised their rights and privileges under such agreements. We are satisfied that article 15(4) contains no indication of an intention to fetter the power of the courts to enforce the contractual position of the parties. In our view it is not essentially different in character from ordinary statutory provisions limiting the time during which various procedural steps can be taken to enforce an action. Such provisions are generally speaking not designed to oust the jurisdiction of the courts but may, at the option of the party sued, be set up to bar a remedy and correct a grievance until the grievance has been investigated in the proper forum.

We would be slow to interfere with the decision of the members of the Malaysian Indian Congress professing to act under their rules, unless it could be shown either that the rules were contrary to natural justice, or that what had been done was contrary to the rules of the association, or that there had been *mala fides* or malice in coming to a decision. It gives us great satisfaction to know that these points were not in issue before us.

Appeal allowed.

Solicitors: *Nahappan, Muthu & Peri; M. Jayasingam & Co.; H. Parjit Singh & Co.*

V. LETCHUMANAN v. CENTRAL MALAYSIAN FINANCE BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Syed Othman F.JJ.) March 7 & 31, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 140 of 1976]

Land Law — Charge — Acknowledgement in charge of receipt of $900,000 — Money in fact drawn from time to time — Annexure to charge — Use of Form 16A — Complaint of breach — Whether specific enough — Total amount not specified when order for sale made — Point not raised at trial — National Land Code, ss. 242, 254 and 257.

In this case the appellant had charged his land to the respondent to secure the repayment of the loan of $900,000. On failure to repay the sum the respondent obtained an order of sale of the land. The appellant appealed. At the trial the appellant had argued (1) that the charge was inaccurate in acknowledging the prior receipt of the sum of $900,000 when in fact the loan was taken by instalments; (2) that the use of Form 16A was wrong and (3) that the breach complained of was not specified in the notice. On the appeal, the appellant also raised the failure of the respondent to specify the total amount due to the chargee at the date when the order for sale was made.

Held: (1) read as a whole the contents of the charge consisting of the statutory form and the annexure did set out the actual agreement between the parties. While there was no obligation at the date of the execution of the charge to pay the $900,000 expressed in the charge, there was also no obligation on the proper construction of the charge to pay any part of the loan actually advanced until demand had been made or, as in this case, without demand, until a full year had clapsed after the release of the complete amount of the loan, when only the first instalment would be payable;

(2) the use of Form 16A in this case was correct;

(3) the notice given in this case was specific enough to enable the appellant to know what was the breach complained of and what he had to do to abort the application for sale;

(4) although the respondent had not specified the total amount due to the chargee on the date when the order of sale was made, as this point was not taken in the court below, the Federal Court was not predisposed at the appellate stage of the proceedings to consider it.

FEDERAL COURT.

S.K. Lingam for the appellant.

Kok Wee Kiat for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The charge executed on September 22, 1973 by the appellant in favour of the respondent, a borrowing company under the Borrowing Companies Act, 1959, was to secure the repayment of a loan of $900,000. The form used was the statutory Form 16A, and in it the appellant acknowledged the prior receipt of the sum of $900,000.

By the terms of the charge contained in an annexure the repayment was to be made on demand and the agreed rate of interest was 12% p.a. An important and relevant qualification was that until demand as provided, the loan was repayable with interest at the agreed rate by four equal six monthly instalments,

"the first to be made on or before the last day of the twelveth (sic) (12th) month (the month following the date of complete release of the loan to be deemed as the first month) and the subsequent instalments to be paid on or before the respective last days the eighteenth (18th) month, the twenty-fourth (24th) month and the thirtieth (30th) month following."

By this provision, the loan was first repayable on demand, and if no demand was made, repayable by instalments on agreed dates, but not before one year after the full sum of $900,000 had been made available to the appellant. The reference to the month following the date of the complete release of the loan is at variance with the acknowledgment in the charge by the appellant of the prior receipt of the entire sum of $900,000. The respondent did not receive the entire sum of $900,000 before or at the execution of the charge. The appellant said he did receive some sums before September 22, a sum at the execution and some other sums after. He also said, rather imprecisely for a businessman, that the total he received was "some" $792,000. The respondent conceded that the appellant was paid a sum of $225,000 only on the day the charge was created and after that, various advances, but averred that eventually the entire sum of $900,000 was lent. This arrangement was said to be at the request of the appellant. All payments were made by cheque.

Clearly this arrangement was to the advantage of the appellant, since interest would not be payable on any part of the amount of the loan until it was lent. Such an arrangement is in fact a common one in the case of an overdraft granted to a customer of a Bank, under which the full overdraft is to be available and to be drawn only when needed. Interest is then chargeable on that part of the overdraft facilities actually utilised. No reason exists why such an arrangement could not be correctly incorporated in the charge under consideration so as to avoid the complaint made in this case that the charge did not express the true state of affairs between the parties. The statutory form is flexible enough and it provides these alternative provisions:

"For the purpose of securing

(a) the repayment, with interest, of a loan of $..... the receipt of which I hereby acknowledge;

(b) the payment ..... with interest and in consideration of ..... of the sum of $.....;

(c) the payment ..... with interest, of the sum from time to time due ..... on my current account/the following account kept between us;"

Where, as in this case, the loan is to be utilised at some future date, (a) is clearly inaccurate and inappropriate and either (b) or (c) should be used.

Nevertheless in our view and with respect, the objection of the appellant grounded on the inaccuracy of the charge by the use of provision (a) above is without substance. We are unable to accept it as invalidating the whole charge. The inaccuracy was curable and was cured by the annexure. From the statement of accounts produced by the respondent, the appellant was charged interest only on the sums advanced and from the time of the advancement. Read as a whole, the contents of the charge, consisting of the statutory form and the annexure did, contrary to the contention of the appellant, set out the actual agreement between the parties, and while it was true, as contended by the appellant, there was no obligation existing at the date of the execution of the charge to pay the $900,000 expressed in the charge, there was also no obligation on a proper construction of the charge to pay any part of the loan actually advanced until demand had been made or, as in this case, without demand, until a full year had elapsed after the release of the complete amount of the loan, when only the first instalment would be payable.

The appellant's next objection to the use of Form 16A was with respect of even less substance. He contended that the provision for repayment by instalments necessitated the use of Form 16B. The use of Form 16A was fatal. Section 242 of the National Land Code provides the answer:

"242. (1) Every charge to secure the repayment of a debt, or the payment of any sum other than a debt, (in either case, whether the amount in question is to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A.

(2) Every charge to secure the payment of an annuity or other periodic sum —

(a) shall be effected by an instrument in Form 16B; and

(b) may if the parties think fit include provision whereby, in the event of the chargee exercising his power of sale, the proceeds of sale (so far as available for the purpose) are to be utilised in or towards the satisfaction of payments subsequently falling due."

Any remaining doubt as to the invalidity of the appellant's submission would be removed if reference was made to Form 16B, which was

"For the purpose of securing to the chargee named below of the sum of $..... annually/quarterly/monthly."

Section 254 National Land Code requires the service of a default notice in a statutory form (Form 16D), (a) specifying the breach complained of, (b) requiring it to be remedied within the period of one month or a period as agreed and (c) warning the chargor of proceedings to obtain an order for sale if the breach is not remedied. The use of statutory forms generally avoids mistakes. On July 29, 1975 the respondent issued such a notice. No difficulty arose over the requirements of conditions (b) and (c). The breach complained of which was specified in (a), was failing to make monthly payments in accordance with clause 1 of the annexure of this charge. From the respondent's statement of accounts, the last release of the loan was made on February 15, 1974. The first

instalment of $225,000 became payable on March 31, 1975. The next instalment was due on September 30, 1975. At the time of the issue of the Notice in Form 16D, the first instalment was, but the second and subsequent instalments were not, due. If, therefore, the breach complained of was the first instalment due on March 31, 1975, then the question would arise whether the "monthly payments" spelled out as the breach complained of, if it referred to the first instalment, was not so imprecise and inaccurate or wrong on the facts as to fail effectively to give notice of the breach to be remedied and to render the notice invalid.

With a certain adroitness that put an end to any further argument, counsel for the respondent referred to clause 1(a)(ii) in the annexure. This sub-clause required the appellant to pay interest every month and counsel therefore contended that the monthly payments in the notice referred to the obligation to pay interest every month, that this was the breach complained of, and that the notice was therefore specific enough to enable the appellant to know what was the breach complained of and what he had to do to abort the application for sale. With respect we agreed. We accordingly held that the notice was not invalid.

A last complaint was made at the appeal of the failure of the respondent in complying with section 257(1)(c) which requires that every order for sale made under section 256 shall specify the total amount due to the chargee at the date on which the order is made. This provision requires the chargee to produce at the hearing of the summons for an order of sale evidence of the amount of the loan and the interest accrued to date at the hearing of the summons. Most annexures to charges contain a provision that the statement of the chargee or the chargee's accountant shall be conclusive proof of the indebtedness of the chargor. The annexure in the instant case had no such provision. Nevertheless, it was required of the respondent to produce evidence of such amount for incorporation in the order of sale sought from the court. This the respondent did not do and the order of court did not therefore specify the total amount due to the chargee. This last objection was therefore the most substantial of the various objections taken by the appellant but his then counsel did not take it in the court below and we were not predisposed at this stage of the proceedings to consider it.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *S.K. Lingam & Co.; Mah-Kok & Din.*

PUBLIC PROSECUTOR v. TAN KIM SAN

[R.Cr.J. (Harun J.) February 20, 1980]

[Kuala Lumpur — Federal Territory Criminal Revision No. 6 of 1980]

Criminal Law and Procedure — Application for postponement on ground that investigations not completed — Magistrate should exercise his power to discharge accused — Criminal Procedure Code (F.M.S. Cap. 6), s. 173(g).

In this case the accused was alleged to have committed criminal breach of trust. The accused was charged on June 9, 1979 and the case was fixed for trial on February 6, 1980. When the case came up for trial, the prosecuting officer applied for postponement on the ground that investigations had not been completed. The learned Magistrate postponed the trial to July 16 and 17, 1980. The case was called for revision.

Held: (1) the police should refrain from the practice of "arrest first, investigate later";

(2) in this case the learned Magistrate should have exercised his powers under section 173(g) of the Criminal Procedure Code and discharged the accused instead of granting a postponement of the case.

CRIMINAL REVISION.

Yusoff bin Wali (Deputy Public Prosecutor) for the Public Prosecutor.

Bhagwan Singh for the respondent.

Harun J.: In this case the accused was alleged to have committed breach of trust of more than $20,000 in cash between May 21, 1974 and April 6, 1978.

The complaint against him was made on May 22, 1978 and he was charged before the Magistrate on June 9, 1979. He claimed trial and hearing was fixed for February 6, 1980.

When the case came up for trial, the prosecuting officer applied for a postponement of at least six months on the ground that investigations had not been completed, whereupon the learned Magistrate postponed the trial to July 16 & 17, 1980.

I sent for the records of this case under section 35 of the Courts of Judicature Act as it appeared to me that an important matter of principle and procedure is involved here.

The principle is that a person should not be charged in court until the investigation into the case against him has been completed and there is *prima facie* evidence to prosecute him of the charge. In other words, a person should not be put in peril of a criminal trial unless the prosecution is able to prove the case against him. To do otherwise is an injustice. It is unjust because of the social stigma that immediately attaches to a person once he is charged in court. He is deserted by his friends. His business is affected. His creditors close on him. His family is ashamed. He is mentally tormented awaiting trial. And last but not least, he has to incur the expense of engaging counsel. There is no consolation in the fact that he may eventually be shown to be innocent of the charge. The damage has been done.

To prosecute a person in court on a criminal charge, therefore is a grave responsibility. With all the facilities at its disposal, the police should refrain from the practice of *"arrest first, investigate later"*. That this is a matter of serious concern to the community is shown by these facts:

(i) During the last six months at the Subordinate Courts in Kuala Lumpur alone, 1,202 criminal cases were postponed because the prosecution was not ready to proceed with the trial for a variety of reasons one of these being that investigations had not been completed. This compares (at the end of the same period) with 1,530 criminal cases awaiting trial (traffic and summons cases excluded).

(ii) The court records also show that of the number of persons who were arrested and detained in re-